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# LOYOLA OF LOS ANGELES INTERNATIONAL AND COMPARATIVE LAW JOURNAL

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## Labor Relations for Multinational Corporations Doing Business in Europe

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### I. INTRODUCTION

Measures to preserve are often the hallmark of times of change. The 1970's and 1980's have been such a period of change for Western Europe, as those nations—like the United States—move from an industrial to a post-industrial economy.<sup>1</sup> In contrast to the economic miracle initiated by the Marshall Plan following World War II, unemployment in Western Europe has risen from approximately 3% to 11% since 1970.<sup>2</sup> Indeed, the number of jobs in the ten-country European Economic Community (EEC)<sup>3</sup> has increased only one-half of one percent in the past decade.<sup>4</sup> Moreover, unemployment in the EEC is expected to rise to 11.5% in 1985, although the EEC's gross domestic product is anticipated to increase at a rate of 2.3% in 1985.<sup>5</sup> Accordingly, it should come as no surprise that the

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1. See, e.g., R. REICH, *THE NEXT AMERICAN FRONTIER* (1983); D. BELL, *THE COMING OF POST-INDUSTRIAL SOCIETY* (1973); K. KUMAR, *PROPHECY AND PROGRESS: THE SOCIOLOGY OF INDUSTRIAL AND POST-INDUSTRIAL SOCIETY* (1978); *The New Economy*, TIME, May 30, 1983, at 65.

2. *The New Economy*, *supra* note 1, at 65.

3. The countries of the European Economic Community are Belgium, the Netherlands, Luxembourg, Italy, France, the Federal Republic of Germany, Denmark, the United Kingdom, Ireland and Greece.

4. *The New Economy*, *supra* note 1, at 65.

5. *Mixed Economic Trends Forecast For 1985 By E.C. Commission*, EUR. COMMUNITY

1970's and 1980's have been an era of increased legislation designed to preserve jobs and enhance responsiveness to employee concerns.<sup>6</sup>

Multinational enterprises have been a favorite target of such legislation because they are often perceived as being least subject to national control. Also, they are often considered to be at the forefront of decisions which affect employees in various countries, through mergers, transfers of operations, and new technologies. Therefore, in the latter half of the 1970's and in the 1980's, specific legislative measures have been proposed to augment employee bargaining power and to increase employee consultations in connection with decisions by multinational enterprises concerning job security and employee rights.

In 1976, the Organization for Economic Cooperation and Development (OECD) adopted the Declaration on International Investment and Multinational Enterprises.<sup>7</sup> One of its best known sections establishes a set of voluntary guidelines for enhancing the rights of employees of multinational corporations.<sup>8</sup> In 1977, the In-

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NEWS, No. 34/1984 (Nov. 30, 1984). See also *E.C. Commission Sees Modest Economic Growth For 1984*, EUROPE: MAGAZINE OF THE EUROPEAN COMMUNITY, Jan./Feb. 1984, at 49; *E.C. Releases Annual Economic Forecast*, EUR. COMMUNITY NEWS, No. 17/1983 (Nov. 1, 1983).

6. Since 1970, the European Economic Community has adopted or proposed a number of labor directives designed to preserve jobs and protect employees, including the Council Directive of 17 February 1975 on the Approximation of the Laws of the Member States Relating to Collective Redundancies, 18 O.J. EUR. COMM. (No. L 48) (1975); Council Directive on the Approximation of the Laws of Member States Relating to the Safeguarding of Employees' Rights in the Event of Transfers of Undertakings, Businesses or Parts of Businesses, 20 O.J. EUR. COMM. (No. 177) 187 (Feb. 14, 1977); The Vredeling Proposal, *infra* note 10; The Fifth Directive, *infra* note 16.

7. OECD Doc. PRESS/A(76)20 (1976) [hereinafter cited as the Declaration on International Investment].

8. *Id.* The Guidelines for Multinational Enterprises [hereinafter cited as the Guidelines], reprinted in R. BLANPAIN, THE BADGER CASE AND THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES 137-44 (1977), are an annex to the Declaration and are an integral part of the Declaration. Within the Guidelines, the section entitled Employment and Industrial Relations provides that enterprises should "respect the right of their employees, to be represented by trade unions" or other employee organizations; provide facilities to employee representatives "to assist in the development of effective collective agreements" and provide employee representatives with information which is necessary for meaningful negotiations on conditions of employment; provide to employee representatives information which enables them to obtain "a true and fair view of the performance of the entity;" "observe standards of employment and industrial relations not less favourable than those observed by comparable employers in the host country;" provide reasonable notice of changes which would have "major effects upon the livelihood of their employees" and cooperate in mitigating the adverse effects of those changes; implement their employment policies without discrimination; and enable authorized representatives to conduct negotiations with man-

ternational Labor Organization (ILO) adopted the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy which also sets forth guidelines concerning the treatment of employees.<sup>9</sup> However, the body which has taken the greatest interest in proposing labor directives for multinational corporations has been the EEC.

Since 1976, the EEC has adopted and proposed various labor directives designed to increase management consultation with employees and to protect workers against the possible adverse effects of mergers, dismissals, or other events which affect them. The most controversial of these, the Vredeling Proposal,<sup>10</sup> was approved by the European Commission<sup>11</sup> on June 16, 1983, and has now been submitted to the European Council of Ministers<sup>12</sup> for its consideration for final adoption.<sup>13</sup> The Vredeling Proposal would obligate the parent company of a transnational enterprise<sup>14</sup> to transmit annually to its subsidiaries within the EEC various types of information concerning its operations and financial condition. It would also require the parent company to advise its subsidiaries of any decisions likely to seriously affect the interests of the subsidiaries' employees so that the subsidiaries can consult with the employees' representatives before the decision is implemented.<sup>15</sup>

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agement representatives "who are authorized to take decisions on the matters under negotiation." *Id.* paras. 2-4, 6, 7, 9.

9. Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy (Nov. 30, 1977), paras. 21-23, 26-28, 30, 31, 33, 34, 36, 37, 41, 42, 46-48, 51, 52, 54-58, *reprinted in* 7 INT'L LEGAL MATERIALS, No. 2 (Mar. 1978).

10. Amended Proposal for a Council Directive on Procedures for Informing and Consulting Employees. COM (83) 292 final (July 8, 1983) [hereinafter cited as the Vredeling Proposal].

11. The European Commission is composed of 14 members who are to be independent from the member states. Treaty of Rome art. 157. It is responsible for drafting the measures taken by the Council of Ministers; ensures that the provisions of the Treaty of Rome (which established the EEC) and the measures taken by the institutions pursuant to the treaty are applied; formulates recommendations on matters addressed in the Treaty of Rome; and exercises powers conferred upon it by the Council for the implementation of the Council's rules. Treaty of Rome art. 155.

12. The Council of Ministers has broad powers to "take decisions," including the power to adopt proposals made by the Commission. It is composed of representatives from each of the member states. Treaty of Rome art. 145.

13. See Vredeling Proposal, *supra* note 10; *E.C. Commission Approves Amended Version of Worker Right's Proposal*, EUR. COMMUNITY NEWS, No. 9/83 (June 16, 1983).

14. The Proposal only covers enterprises with respect to which the parent enterprise and its subsidiaries collectively employ at least 1,000 workers in the EEC. Vredeling Proposal, *supra* note 10, art. 2(1).

15. See Vredeling Proposal, *supra* note 10, arts. 3 & 4.

On July 28, 1983, the European Commission approved a revision of a controversial draft addressing worker participation. This revised directive would require larger firms to guarantee worker participation by (1) creating a separate supervisory board with employee membership, (2) maintaining a single board with some members allocated to supervisory roles (some of which would represent employees), (3) creating employee representative bodies for consultations, or (4) entering collective bargaining agreements subject to minimum standards for employee participation.<sup>16</sup> This proposal has also been submitted to the European Council of Ministers for consideration for final adoption.<sup>17</sup>

Finally, the European Commission is expected to submit to the Council of Ministers a draft of a directive known as the "Ninth Company Law Directive."<sup>18</sup> This directive would establish a new set of parent-subsidiary relationships through "control contracts." The directive would encourage parent companies to acquire the right to manage their EEC subsidiaries in the interests of the group through such "control contracts" by subjecting the parent companies to additional liabilities if they do not.<sup>19</sup>

Proposals of this type, however, run risks. Despite their laudable goals (i.e., enhanced protection for employees and others), such legislative initiatives must be carefully drafted so that they do not provide too much protection. Where protection is so great that it discourages change (rather than mitigating its consequences), it can

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16. Amended Proposal for a Fifth Directive Founded on article 54(3)(g) of the EEC Treaty Concerning the Structure of Public Limited Companies and the Powers and Obligations of Their Organs. 26 O.J. EUR. COMM. (No. C 240) 2 (Sept. 9, 1983).

17. *Id.* at 2; see *supra* note 12.

18. The official version of the Ninth Company Law Directive has not yet been published; however, various drafts have been leaked. Accordingly, the proposal can thus only be discussed in broad terms since it is subject to revision until an official version is announced. In this Article, citations will be to the Commission's 1983 draft of the Ninth Directive.

19. According to the 1983 draft of the Ninth Directive, a parent company which fails to enter into a "control contract" with its subsidiaries in the EEC, and which directly or indirectly exercises a decisive influence over the decision-making of the management body of a subsidiary, would be "regarded as a *de facto* member of the management body" of the subsidiary. Art. 6(2). The parent would be liable to the subsidiary "for any damage resulting from such interference and attributable to mismanagement, under the same conditions as if the undertaking were a member of the management body" of the subsidiary. Art. 6(1). Additionally, each member of the management body of the parent company would, together with the parent, bear joint and several unlimited liability, which could only be relieved if the member proved that the influence giving rise to the subsidiary's damage is not attributable to him. Art. 6(3)(a).

retard improvement of the very condition which necessitates the protection. Each of the foregoing initiatives establishes a different balance between protection and change. That balance will significantly influence the prospects for successfully weathering the current economic storm in Europe.

## II. THE OECD'S DECLARATION ON INTERNATIONAL INVESTMENT AND MULTINATIONAL ENTERPRISES

Established on December 14, 1960, the OECD is the successor to the Organization for European Economic Cooperation, which administered the Marshall Plan. The OECD is comprised of twenty-four nations.<sup>20</sup>

On June 21, 1976, the OECD adopted the Declaration on International Investment and Multinational Enterprises<sup>21</sup> which annexed a set of guidelines for multinational enterprises. The most significant of the guidelines are in the chapter on Employment and Industrial Relations,<sup>22</sup> not only because of their subject matter but because they have been invoked more often and with more publicity than the guidelines in other chapters.<sup>23</sup> Although the guidelines are voluntary, members of the OECD are encouraged to publicize and promote adherence to them. The OECD recommends that multinational enterprises publicly state their acceptance of the guidelines,<sup>24</sup> and a number of them have done so in their financial reports.

### A. *The OECD's Guidelines on Employment and Industrial Relations*

The OECD's guidelines on Employment and Industrial Relations are specifically designed to protect employees from the consequences of economic change.<sup>25</sup> They accomplish this by using three

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20. The OECD is composed of the following nations: Australia, Austria, Belgium, Canada, Denmark, Finland, France, the Federal Republic of Germany, Greece, Iceland, Ireland, Italy, Japan, Luxembourg, the Netherlands, New Zealand, Norway, Portugal, Spain, Sweden, Switzerland, Turkey, the United Kingdom and the United States.

21. See *supra* note 7.

22. See *supra* note 8.

23. See Mid-Term Report on the 1976 Declaration and Decisions of International Investment and Multinational Enterprises, OECD, 1982, para. 20; Wakkie, *Some Comments on the Impact of the OECD Guidelines For Multinational Enterprises on European Employment Relations*, 2 LOY. L.A. INT'L & COMP. L.J. 75, 79, 81-89 (1979).

24. See OECD's Review of the 1976 Declaration and Decisions on International Investment and Multinational Enterprises, June 13-14, 1979, para. 9.

25. OECD Declaration on International Investment and the annexed Guidelines for

devices: (1) Increased disclosure of information to assist employees in negotiations; (2) reasonable notification to employee representatives of changes in operations in order to mitigate their adverse effects; and (3) increased employee access to the decision-making authority of the multinational enterprise.

The disclosure provisions reflect the drafters' concern that the information which a subsidiary provides to its employees may be inadequate. Accordingly, paragraph 3 of the section entitled Employment and Industrial Relations recommends that employee representatives be provided with information "which enables them to obtain a true and fair view of the performance of the entity or, where appropriate, the enterprise as a whole,"<sup>26</sup> and paragraph 2(b) provides that enterprises should, within the framework of the law of the host country, provide employee representatives with information necessary to conduct meaningful negotiations on the conditions of employment.<sup>27</sup>

The European trade union movement has pressed for the dissemination of more information to employee representatives based partly upon an economic theory which one representative calls "Keynes plus."<sup>28</sup> According to this theory, because West European economies are no longer growing significantly, unions must negotiate a redistribution of the fixed pie of wealth, rather than expect increased wealth from a growing pie. The dissemination of more information is viewed as a means to improve the bargaining power of employees to negotiate such a redistribution. Interestingly, the more radical members of the European trade union movement op-

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Multinational Enterprises, Chapter on Employment and Industrial Relations, *supra* note 8, paras. 3, 5, 6, 9.

26. *Id.* para. 3. The full text of paragraph 3 provides:

Enterprises should, within the framework of law, regulations and prevailing labor relations and employment practices, in each of the countries in which they operate,

...  
3. provide to representatives of employees where this accords with local law and practice, information which enables them to obtain a true and fair view of the performance of the entity or, where appropriate, the enterprise as a whole. . . .

*Id.*

27. *Id.* para. 2(b). The text of paragraph 2(b) provides:

Enterprises should, within the framework of law, regulations and prevailing labor relations and employment practices, in each of the countries in which they operate,

...  
2(b). provide to representatives of employees information which is needed for meaningful negotiations on conditions of employment.

*Id.*

28. Interview with Steven Pursey, Economist, International Confederation of Free Trade Unions, Brussels (May 5, 1981).

pose such disclosure policies because they view a redistribution of wealth as a means of co-opting the trade union movement into the capitalist system.<sup>29</sup>

The next device used in the guidelines is a notification provision.<sup>30</sup> It is intended to give employees of multinational enterprises advance notice of decisions which might affect their employment status and thereby give them an opportunity to mitigate any adverse effects through negotiation. This provision reflects employee concern over the loss of jobs in the 1970's caused by mergers and closures of which employees received no notice. Consequently, paragraph 6 recommends that in considering changes in their operations which would have "major effects upon the livelihood of their employees," such as plant closures or employee dismissals, enterprises should provide reasonable notice and cooperate with employee representatives to mitigate "to the maximum extent practicable adverse effects."<sup>31</sup>

Finally, the third type of provision giving employees access to the decision-making authority of the multinational corporation, is premised on the assumption that the parent company of a multinational enterprise occasionally makes decisions which affect its subsidiaries' employees, and that, accordingly, those employees should have the opportunity to negotiate with the body authorized to make those decisions.<sup>32</sup> Paragraph 9 of the section entitled Employment

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29. *Id.*

30. See Guidelines, *supra* note 8, para. 6. The full text of paragraph 6 provides: Enterprises should, within the framework of law, regulations and prevailing labor relations and employment practices, in each of the countries in which they operate,

6. in considering changes in their operations which would have major effects upon the livelihood of their employees, in particular in the case of the closure of an entity involving collective lay-offs or dismissals, provide reasonable notice of such changes to representatives of their employees, and where appropriate to the relevant governmental authorities, and co-operate with the employee representatives and appropriate governmental authorities so as to mitigate to the maximum extent practicable adverse effects. . . .

*Id.*

31. *Id.*

32. *Id.* para. 9. The text of paragraph 9 provides:

Enterprises should, within the framework of law, regulations and prevailing labor relations and employment practices, in each of the countries in which they operate,

9. enable authorized representatives of their employees to conduct negotiations on collective bargaining or labour management relations issues with representatives of management who are authorized to take decisions on the matters under negotiations.

*Id.*

and Industrial Relations recommends that enterprises allow authorized employee representatives to conduct negotiations with representatives of management "who are authorized to make decisions on the matters under negotiations."<sup>33</sup> Paragraph 8 of the Introduction to the Guidelines recognizes that multinational enterprises are comprised of entities, one or more of which may be able to exercise significant influence over others.<sup>34</sup> When construed together, these provisions encourage employee access to the decision-making authority of the enterprise.

### *B. Cases Construing the Guidelines*

The OECD Declaration has had its greatest impact in decisions construing the guidelines. The Committee on International Investment and Multinational Enterprises (IME Committee) is responsible for interpreting the Declaration on International Investment and the annexed guidelines.<sup>35</sup> An interpretation usually arises in the context of a particular case concerning the conduct of a certain multinational enterprise. While the IME Committee may not take a po-

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33. *Id.*

34. Guidelines, *supra* note 8, Introduction. Paragraph 8 of the Introduction to the Guidelines states:

A precise legal definition of multinational enterprises is not required for the purposes of the guidelines. These usually comprise companies or other entities whose ownership is private, state or mixed, established in different countries and so linked that one or more of them may be able to exercise a significant influence over the activities of others and, in particular, to share knowledge and resources with the others. The degree of autonomy of each entity in relation to the others varies widely from one multinational enterprise to another, depending on the nature of the links between such entities and the fields of activity concerned. *For these reasons, the guidelines are addressed to the various entities within the multinational enterprise (parent companies and/or local entities) according to the actual distribution of responsibilities among them* on the understanding that they will co-operate and provide assistance to one another as necessary to facilitate observance of the guidelines. The word 'enterprise' as used in these guidelines refers to these various entities in accordance with their responsibilities.

*Id.* para. 8 (emphasis added).

35. The IME Committee was established by a resolution of the Council of the OECD, which consists of representatives from all member states. Resolution of the Council Establishing a Committee on International Investment and Multinational Enterprises, OECD Doc. C(74)247 (1975). The purpose of the Committee is to supervise implementation of the Declaration on International Investment and Multinational Enterprises, and to coordinate consultation among governments concerning it. Although business and labor organizations cannot be members of the OECD, employers have formed the Business and Industry Advisory Committee (BIAC) and trade unions have established the Trade Union Advisory Committee (TUAC), which enjoy consultative status at the OECD. Wakkie, *supra* note 23, at 77. In their roles, BIAC and TUAC are permitted to request an interpretation of the Guidelines for Multinational Enterprises from the IME Committee.

sition on the conduct of the particular enterprise involved and will therefore address the issues without reference to that enterprise,<sup>36</sup> its interpretations have considerable moral force because they receive broad support from governments, employers and trade unions.<sup>37</sup> Moreover, the parties to the dispute will often announce how the Committee's construction of the guidelines supports their position, and conduct perceived to be in violation of the guidelines can damage the offender's reputation.<sup>38</sup>

One of the earliest cases construing the OECD's guidelines is known as the *Badger* case,<sup>39</sup> in which the IME Committee interpreted paragraph 8 of the Introduction to the Guidelines. Paragraph 8 provides that multinational enterprises are entities that are so linked that one or more might be able to exercise significant influence over the activities of the others.<sup>40</sup> In *Badger*, Badger Company, Inc., an affiliate of a Massachusetts corporation, had a Belgian subsidiary, Badger (Belgium) N.V.<sup>41</sup> When the Belgian subsidiary had to be closed down, 250 employees were dismissed.<sup>42</sup> Although Belgian law provided that dismissed employees were entitled to severance pay, the subsidiary was only able to pay a portion of the

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36. Article 3 of the Decision of the Council on Inter-Governmental Consultation Procedures on the Guidelines for Multinational Enterprises, *reprinted in* R. BLANPAIN, *THE BADGER CASE AND THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES* 46 (1977), states: "The Committee shall not reach conclusions on the conduct of individual enterprises."

37. See Wakkie, *supra* note 23, at 83-85; OECD's Review of the 1976 Declaration, *supra* note 24.

38. For instance, the Belgian government announced the committee's decision in the *Badger* case, and the trade unions have publicly argued how the outcome in the *British Oxygen* case justified their position. See Wakkie, *supra* note 23, at 83-84.

39. The *Badger* case, written question number 323/77 of June 29, 1977 (Mr. Van der Hek), and the answer of the Commission, 20 O.J. EUR. COMM. (No. C 246) 17, 18 (Sept. 14, 1977). There is, however, no official source which states the facts of the *Badger* case (or of any other case considered by the IME Committee) partly because the Committee is not permitted to reach conclusions on the conduct of individual enterprises. See *supra* note 36. Instead, the IME Committee only publishes its legal analysis of the guidelines in issue in the case.

The facts of the *Badger* case are discussed at length in R. BLANPAIN, *supra* note 36, at 55-56, and in Wakkie, *supra* note 23, at 83-84. Professor Blanpain's rendition of the facts is the most exhaustive since the Belgian Secretary of State for Regional Economy, Professor Dr. Mark Eyskens, appointed Professor Blanpain advisor for the *Badger* case. In that capacity, Professor Blanpain helped to prepare the Belgian point of view for the OECD meetings on the case and was actively involved in negotiations between Badger Company, Inc., and the Belgian trade unions. R. BLANPAIN, *supra* note 36, Introductory Remarks.

40. Introduction to the Guidelines for Multinational Enterprises, *supra* note 34, para. 8.

41. R. BLANPAIN, *supra* note 36, at 51, 67.

42. *Id.* at 51.

amount required by law.<sup>43</sup> The Belgian Government then requested that the parent, Badger Company, Inc., provide the funds to pay the balance.<sup>44</sup> When it refused on the grounds of limited liability, the Belgian Government raised the matter before the IME Committee.<sup>45</sup> At the end of the meeting, the Belgian delegation to the IME Committee stated that it was concluded, *inter alia*, that "a parent company is, under certain circumstances, morally responsible for the liabilities of its local entities."<sup>46</sup> After the meeting, the Belgian Government and Badger Company, Inc. entered into negotiations and agreed upon a settlement amounting to approximately twenty-five million Belgian francs<sup>47</sup> to satisfy the subsidiary's obligation to provide severance pay.<sup>48</sup>

In another case before the IME Committee, the *Hertz Rent-A-Car Company* case,<sup>49</sup> the Committee interpreted a guideline which provided that enterprises should not threaten to transfer all or part of an operating unit in an attempt to influence negotiations unfairly or to discourage worker organization.<sup>50</sup> In *Hertz*, the Hertz Rent-A-Car Company transferred employees from its other European branches to Denmark to replace Danish employees who had gone on strike, demanding a salary increase.<sup>51</sup> Although paragraph 8 of the Employment and Industrial Relations Chapter referred to a threat to transfer all or part of an *operating unit* to influence negotia-

43. *Id.* at 51, 75, 76, 81; Wakkie, *supra* note 23, at 83.

44. R. BLANPAIN, *supra* note 36, at 51, 105-08; Wakkie, *supra* note 23, at 83.

45. R. BLANPAIN, *supra* note 36, at 51, 112-13; Wakkie, *supra* note 23, at 84.

46. R. BLANPAIN, *supra* note 36, at 116-17; Wakkie, *supra* note 23, at 84-85.

47. Wakkie, *supra* note 23, at 85.

48. As we will argue, the EEC's draft Ninth Directive, *supra* note 18, is also intended to address this type of issue.

49. The *Hertz-Rent-A-Car* case, EUR. COMM. DOC. 424/76, Nov. 15, 1976; EUR. PARL. RES. of Nov. 16, 1976, Official Journal 1976, C. 293/12; Debates, same date, at 46-51. The facts of this case are recited in R. BLANPAIN, THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES AND LABOUR RELATIONS 1976-1979 at 219-24 (1979). See also Wakkie, *supra* note 23, at 82.

50. Guidelines, *supra* note 8, para. 8. Paragraph 8, as originally worded, provided:

Enterprises should, within the framework of law, regulations and prevailing labor relations and employment practices, in each of the countries in which they operate,

...

8. in the context of bona fide negotiations with representatives of employees on conditions of employment, or while employees are exercising a right to organize, not threaten to utilize a capacity to transfer the whole or part of an operating unit from the country concerned in order to influence unfairly those negotiations or to hinder the exercise of a right to organize. . . .

*Id.*

51. Wakkie, *supra* note 23, at 82; R. BLANPAIN, *supra* note 49, at 221.

tions, it did not address the transfer of *employees* to achieve the same end, and therefore did not expressly address the circumstances in the *Hertz* case.<sup>52</sup>

After reviewing the case, the IME Committee stated that the Hertz Company's conduct "would not be in conformity with the general spirit and approach" of the guidelines and recommended that paragraph 8 be amended to include a prohibition against the transfer of employees between an enterprise's foreign subsidiaries in order to influence negotiations unfairly.<sup>53</sup> The OECD governments then amended the guidelines to reflect the Committee's recommendation.<sup>54</sup>

One of the most controversial cases decided under the OECD Declaration and guidelines is known as the *British Oxygen* case,<sup>55</sup> in which the IME Committee interpreted the guidelines relating to employee access to an enterprise's decision-making authority. In that case, when British Oxygen decided to cancel a future investment plan which it had contemplated with respect to its Swedish subsidiary, Viggo, the trade unions argued that it had an obligation to negotiate with the local employee representatives in Sweden.<sup>56</sup>

The dispute came before the IME Committee on March 6, 1980.<sup>57</sup> The Committee held that paragraph 8 of the Introduction to the Guidelines, together with paragraph 9 of the Employment and Industrial Relations Chapter, reaffirmed that parent companies are expected to take necessary steps to enable their subsidiaries to observe the guidelines by providing them with adequate and timely information and ensuring that the management representatives at

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52. OECD's Review of the 1976 Declaration and Decisions on International Investment and Multinational Enterprises, *supra* note 24, at 70, reprinted in R. BLANPAIN, *supra* note 49, at 226-27.

53. *Id.*

54. *Id.* at 227.

55. Committee on International Investment and Multinational Enterprises, "Application of Paragraph 9 of the Employment and Industrial Relations Guidelines to Investment Matters." IME (80) 23 (Dec. 10, 1980); Mid-Term Report on the 1976 Declaration and Decisions on International Investment and Multinational Enterprises, *supra* note 23, at 61-64.

56. Interview with Hans Piehl, then head of the department responsible for company law, democratization of economy and multinationals, at the European Trade Union Corporation, Brussels (May 5, 1981); OECD's Review of the 1976 Declaration, *supra* note 24.

57. Committee on International Investment and Multinational Enterprises, "Application of Paragraph 9," *supra* note 55; Mid-Term Report on the 1976 Declaration and Decisions on International Investment and Multinational Enterprises, *supra* note 23, at 61-64.

the national or local level have sufficient authority to negotiate.<sup>58</sup> The Committee stressed that paragraph 9 was carefully worded to "avoid the need for defining the locus of the negotiations or the proper level of management to be involved."<sup>59</sup> This would depend, according to the Committee, upon the decision-making structure of the particular multinational enterprise.<sup>60</sup> It concluded that an enterprise has a range of possible means to insure that negotiations are conducted in a meaningful manner:

(1) The enterprise can "provide the management of the subsidiary with adequate and timely information and . . . insure that it has sufficient powers to conduct meaningful negotiations with representatives of employees";

(2) the enterprise can "nominate one or more representative[s] of the decision-making center to the negotiating team of the subsidiary"; and

(3) the enterprise's management can "engage directly in negotiations" with the local employee representatives.<sup>61</sup>

The most controversial of the suggestions in *British Oxygen* was that of direct negotiations between local employee representatives and the management of the decision-making center. In the view of management, such an alternative would diminish the authority of the subsidiary to negotiate with its employees in the future and would encourage local employee representatives to "leapfrog" local management. The effect of that suggestion, however, was softened by the first two options and the Committee's recognition that these means were not exclusive.<sup>62</sup> Both British Oxygen and the trade unions, therefore, hailed the decision as a victory. British Oxygen argued that the trade unions' contention that they should be permitted to negotiate directly with the management of the parent company had been rejected,<sup>63</sup> while the trade unions could claim as a victory

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58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. The IME Committee expressly stated that the management of the enterprise "would seem to have a range of possibilities among which it would choose or that it could combine" in carrying out its responsibilities for providing access to the enterprise's decision-making authority. In identifying specific options available to ensure that negotiations are conducted in a meaningful manner, the Committee stated that those were simply "examples" of the alternatives. Application of Paragraph 9, *supra* note 55, at 3.

63. Interviews at British Oxygen, Hammersmith House, in Hammersmith W6 England (May 26, 1981).

the IME Committee's recognition that direct negotiation with the parent could be appropriate.<sup>64</sup>

The *Philips* case<sup>65</sup> further tightened the construction of the employee access guideline. In that case, involving the closure of a subsidiary of Philips in Finland, the Committee stated that where management representatives negotiate without the authority to make decisions on the matters under negotiation, the enterprise has acted contrary to the guidelines.<sup>66</sup>

While some of the cases under the OECD guidelines have been controversial, the fairness of the guidelines themselves has been applauded by both industry and labor.<sup>67</sup> Many companies agree that the OECD guidelines provide both flexibility and guidance for employment relations.<sup>68</sup>

### III. THE INTERNATIONAL LABOR ORGANIZATION'S TRIPARTITE DECLARATION OF PRINCIPLES

The International Labor Organization (ILO) is a tripartite organization in which governments, employers and employees are represented.<sup>69</sup> Its express objective is to improve the economic and social position of workers and to safeguard employees' rights.<sup>70</sup>

On November 16, 1977, the ILO adopted the Tripartite Declaration of Principles Concerning Multinational Enterprises and So-

64. Interview with Hans Piehl, *supra* note 56. The issue of employee access to the decision-making authority is also addressed in the Vredeling Proposal, *supra* note 10. A clause in a previous draft of the Vredeling Proposal, which authorized direct negotiations between a subsidiary's employees' representative and the management of the parent company, however, has been deleted in the revised draft which was approved by the European Commission last year. See former draft, 23 O.J. EUR. COMM. (No. C 297) art. 6(5) (1980).

65. Trade Union Advisory Committee Statement for the Mid-Term Report on the OECD Guidelines for Multinational Enterprises, paras. 21 & 36 (Oct. 1981).

66. *Id.*

67. See Mid-Term Report on the 1976 Declaration and Decisions on International Investment and Multinational Enterprises, *supra* note 23, at 13-14.

68. OECD Review of the 1976 Declaration, *supra* note 24; Interviews at Ford Werke Koln, Koln, Federal Republic of Germany (May 19, 1981); Bundesverband der Deutschen Industrie, Koln, Federal Republic of Germany (May 19, 1981); Shell Warte GmbH, Hamburg, Federal Republic of Germany (May 21, 1981).

69. The ILO was formed as a part of the system established by the League of Nations after World War I. See J.T. SHOTWELL, *THE ORIGIN OF THE INTERNATIONAL LABOR ORGANIZATION* (1934).

70. See ILO CONST. From 1977 to 1980, the United States refused to participate in the ILO because it believed that the ILO had become too politicized. The United States rejoined when that trend was reversed. See Landy, *The Implementation Procedures of the International Labor Organization*, 20 SANTA CLARA L. REV. 633 (1980).

cial Policy,<sup>71</sup> in which multinational enterprises were recommended to observe the policies stated in the declaration on a voluntary basis.<sup>72</sup> Like the OECD Guidelines upon which it was partly based,<sup>73</sup> the Tripartite Declaration provides for (1) increased disclosure of information to enable employee representatives to accurately assess the performance of the entity so that they can meaningfully negotiate,<sup>74</sup> (2) reasonable notification to employees of changes in operations,<sup>75</sup> and (3) employee access to the enterprise's decision-making authority.<sup>76</sup>

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71. Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, *supra* note 9 [hereinafter cited as Tripartite Declaration of Principles].

72. The preamble to the Tripartite Declaration of Principles "invites" governments of state members of the ILO, organizations of employers and workers, and multinational enterprises operating within their territories to observe the principles embodied therein. Paragraph 5 of the Preamble specifically states that the principles "are intended to guide the governments, employers' and workers' organizations and the multinational enterprises in taking such measures and actions and adopting such policies . . . as would further social progress." *Id.*

73. Although the ILO commenced its work on the Tripartite Declaration of Principles before the OECD established the IME Committee for purposes of preparing the Guidelines for Multinational Enterprises, agreement among governments, business organizations and trade unions was reached on the OECD guidelines before the adoption of the Tripartite Declaration of Principles. Indeed, adoption of the OECD's guidelines helped clear the way for the enactment of similar provisions in the Tripartite Declaration of Principles. See OECD's Review of the 1976 Declaration, *supra* note 24, para. 30; Letter from William Withereil, Deputy Director, Financial, Fiscal, and Enterprise Affairs of the OECD (Apr. 19, 1982).

74. Tripartite Declaration of Principles, *supra* note 9, para. 54. Paragraph 54 provides: Multinational enterprises should provide workers' representatives with information required for meaningful negotiations with the entity involved and, where this accords with local law and practices, should also provide information to enable them to obtain a true and fair view of the performance of the entity, or where appropriate, of the enterprise as a whole.

*Id.*

75. Tripartite Declaration of Principles, *supra* note 9, para. 26. Paragraph 26 provides: In considering changes in operations (including those resulting from mergers, takeovers or transfers of production) which would have major employment effects, multinational enterprises should provide reasonable notice of such changes to the appropriate government authorities and representatives of the workers in their employment and their organizations so that the implications may be examined jointly in order to mitigate adverse effects to the greatest possible extent. This is particularly important in the case of the closure of an entity involving collective lay-offs or dismissals.

*Id.* This paragraph resembles paragraph 6 of the Employment and Industrial Relations Chapter of the OECD Guidelines for Multinational Enterprises, *supra* note 30.

76. Tripartite Declaration of Principles, *supra* note 9, para. 51. Paragraph 51 provides: "Multinational enterprises should enable duly authorized representatives of the workers in their employment in each of the countries in which they operate to conduct negotiations with representatives of management who are authorized to take decisions on the matters under negotiation." *Id.* This paragraph is identical to paragraph 9 of the Employment and

#### IV. LABOR DIRECTIVES OF THE EUROPEAN ECONOMIC COMMUNITY

The EEC, now composed of ten nations,<sup>77</sup> has been at the forefront in proposing legislation relating to employee relations for multinational enterprises. At one level, this is a result of the concern of various commissioners of the European Commission<sup>78</sup> over the ability of multinational enterprises, whose decision-making center is in one country, to make decisions which affect employees in another.<sup>79</sup> Since article 100 of the Treaty of Rome<sup>80</sup> grants the EEC the power to issue directives<sup>81</sup> to harmonize laws between the member states which "directly affect the establishment or functioning of the Common Market,"<sup>82</sup> the EEC was deemed the appropriate body to control the perceived abuses of multinational companies.<sup>83</sup> Through its directives, the EEC could set certain minimum standards which all member states were obliged to enact in their national legislation. Such minimum standards could therefore apply to all of an enterprise's subsidiaries within the EEC, regardless of the state in which each was located.

At another level, however, the EEC's concentration on labor

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Industrial Relations Chapter of the OECD's Guidelines for Multinational Enterprises, *supra* note 32.

77. *See supra* note 3.

78. *See supra* note 11.

79. Interview with Robert Coleman, then employed in the Commission's Directorate-General for Internal Market and Industrial Affairs, European Commission, Brussels (May 4, 1981).

80. The Treaty of Rome, executed on March 25, 1957, established the European Economic Community, then comprising six member states and now expanded to ten. *See supra* note 3. The EEC is commonly known as the Common Market. The purpose of the treaty was to establish a common market among the member states through the harmonization of their economic policies and activities, and thereby promote economic and social progress. *See* Preamble and Treaty of Rome art. 2. The principal features of the Common Market include the elimination of customs duties and quantitative restrictions on the import and export of goods among the member states; the establishment of a common customs tariff and common commercial policy toward third countries; the achievement of freedom of movement for persons, services and capital among the member states; and the adoption of a common policy in the sphere of agriculture. *See* Treaty of Rome art. 3.

81. In contrast with a regulation which is "binding in its entirety and directly applicable in all member states," a "directive," while "binding as to the result," leaves to the national authorities the choice of "form and methods." Treaty of Rome art. 189.

82. Article 100 of the Treaty of Rome provides: The Council shall, acting unanimously on a proposal from the Commission, issue directives for the approximation of such provisions laid down by law, regulation or administrative action in Member States as directly affect the establishment or functioning of the common market.

83. Interview with Robert Coleman, *supra* note 79.

legislation relating to multinational enterprises is the result of a shift in emphasis, if not philosophy, within the EEC. The EEC was originally based on a growth model: The Treaty of Rome, the source of the EEC's power, manifested the belief that the reduction of customs barriers between the member states and the free movement of labor and capital would promote competition and spur growth, just as the more sophisticated customs union established by the United States Constitution<sup>84</sup> has promoted economic growth here.<sup>85</sup> With the 1973-74 oil embargo and the ensuing reduction in economic growth,<sup>86</sup> however, the EEC shifted its legislative efforts from growth to social welfare and labor goals. Indeed, article 100 of the Treaty of Rome has been used in a manner analogous to the Commerce Clause of the United States Constitution: both provisions, originally intended as jurisdictional bases for legislation harmonizing trade between states, have now also served as jurisdictional sources of social and labor legislation.<sup>87</sup> Like the Civil Rights Act of 1964, which was jurisdictionally based upon the Commerce Clause, the Vredeling Proposal of the EEC illustrates a broader jurisdictional basis of article 100.<sup>88</sup>

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84. See U.S. CONST. art. I, § 8, cl. 3.

85. From 1965 to 1975, the gross domestic product of France rose at an annual percentage rate of 4.7, Italy at 4.1, the Netherlands at 4.4, Belgium at 4.1, and Germany at 3.2. BASIC STATISTICS OF THE COMMUNITY 28 (table 17) (15th ed. 1977). In contrast, the gross domestic product of the United Kingdom and Denmark, which did not enter the EEC until 1973, rose at an annual rate during the period of 2.2 and 3.2, respectively. *Id.* Of course, other factors are also responsible for the differences in growth during this period.

86. See Darby, *The Price Of Oil And World Inflation And Recession*, 72 AM. ECON. REV. 738 (1982).

87. Originally, the Commerce Clause, U.S. CONST. art. I, § 8, cl. 3, was intended to harmonize trade between the states by restraining them from imposing duties and levies on activities affecting interstate commerce. THE FEDERALIST NO. 22 (A. Hamilton), NO. 42 (J. Madison). During and after the 1930's, however, the Commerce Clause became a constitutional justification for New Deal legislation. See, e.g., *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937); *United States v. Darby*, 312 U.S. 100 (1941); *Wickard v. Filburn*, 317 U.S. 111 (1942). Later, the Commerce Clause was relied upon as a source of constitutional authority for civil rights legislation. See, e.g., *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964); *Katzenbach v. McClung*, 379 U.S. 294 (1964). Analogously, although article 100 of the Treaty of Rome provides for the harmonization of laws in order to enhance the functioning of the Common Market, in the past decade it has more frequently been used to justify social and labor legislation. For instance, in addition to the Vredeling Proposal, *supra* note 10, it has been used as a jurisdictional justification for the proposed uniform products liability directive, 19 O.J. EUR. COMM. (No. C 241) (Oct. 14, 1976).

88. See *supra* note 87.

### A. The Vredeling Proposal

The most controversial of the EEC's proposed labor directives is the Vredeling Proposal. This proposal, entitled "A Directive on Procedures for Informing and Consulting Employees,"<sup>89</sup> is named after the Dutch Commissioner for Social Affairs, Mr. Henk Vredeling, who, with Commissioner Davignon, first proposed the directive. On June 16, 1983, the European Commission approved an amended version of the measure and submitted it to the Council of Ministers to consider its adoption.<sup>90</sup>

The Vredeling Proposal<sup>91</sup> would require the parent company<sup>92</sup> of a multinational enterprise<sup>93</sup> to report information to its subsidiaries on two types of instances. First, the parent company would be required to annually transmit various types of information about its operations and financial condition to the management of each of its subsidiaries located within the EEC. The information, to be transmitted on an annual basis, must give a clear picture "of the activities of the parent undertaking and its subsidiaries as a whole"<sup>94</sup> and relate to (1) the parent company's structure, (2) its economic and financial situation, (3) the probable development of the business and of production and sales, (4) the employment situation and projected trends, and (5) investment prospects.<sup>95</sup> If the management of a subsidiary does not submit the information to the employee representatives within thirty days, the representatives may submit a written request to the parent company for the relevant information.<sup>96</sup> Second, the proposal would require the parent company to apprise its subsidiaries of any decisions likely to have serious consequences on their employees' interests before those decisions are implemented. This is intended to provide the subsidiaries an opportunity to consult with their employees.<sup>97</sup>

The proposal sets forth a timetable for disclosure by the parent

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89. See *supra* note 10.

90. See *supra* note 13.

91. See *supra* note 10.

92. A parent company is one which satisfies the criteria defining a parent company under the Seventh Council Directive. 26 O.J. EUR. COMM. (No. L 193) art. 1 (July 18, 1983). See Vredeling Proposal, *supra* note 10, art. 1.

93. See *supra* note 14.

94. Vredeling Proposal, *supra* note 10, arts. 3 & 4.

95. *Id.* art. 3(1).

96. *Id.* art. 3(2).

97. *Id.* art. 3(5). In addition, member states would be obligated to enact "appropriate" penalties for failure to comply with these provisions. *Id.* art. 3(7).

company to its subsidiaries for meaningful consultations between its subsidiaries and their employee representatives as to those decisions liable to have serious consequences for the interests of the subsidiaries' employees.<sup>98</sup> The parent company must transmit information<sup>99</sup> relating to the matter in question to the subsidiary concerned "in good time" before a final decision is taken.<sup>100</sup> The management of each subsidiary must then transmit the information to its employee representatives, request their opinion within a period of at least thirty days, and hold consultations with them "with a view to attempting to reach agreement."<sup>101</sup>

Each state is to implement procedures for the employees' representatives to bring proceedings before a court or tribunal to compel the management of the parent or subsidiary to comply with these duties.<sup>102</sup> Where the management of a parent company is located outside of the EEC, the management must appoint an agent who is responsible for fulfilling the requirements under the proposal, or the management of each subsidiary concerned will be held responsible.<sup>103</sup>

Confidential information, defined as information, which "if disclosed, could substantially damage the undertaking's interests or lead to the failure of its plans," can be withheld.<sup>104</sup> The mem-

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98. *Id.* art. 4.

99. Specifically, the information transmitted to the management of the subsidiary must relate to "the grounds for the proposed decision," "the legal, economic and social consequences of such decision for the employees concerned," and "the measures planned in respect of such employees." *Id.* art. 4(1).

100. *Id.*

101. *Id.* art. 4(3)

102. *Id.* art. 4(4). Since the proposal is in the form of a directive, *see supra* note 81, specific measures to implement it will not be enacted until after its adoption by the Council of Ministers.

103. *Id.* art. 2(2). While this provision attempts to avoid the proposal's extraterritorial reach to those parent companies located outside the EEC, however, it may deny due process to companies within the EEC. Where a subsidiary within the EEC is penalized because of its parent company's failure to comply with the directive, the minority shareholders of that subsidiary will be unfairly penalized for the omissions of a party outside their control and beyond the jurisdiction of the EEC.

104. *Id.* art. 7(1). The definition of "confidential information" is both narrow and broad. It is narrow because, in the words of the United States Industry Coordinating Group, it "ignores the fact that, in reaching such a judgment, managers must consider not only whether disclosure of the terms of information concerned would be substantially harmful to the company, but also whether its disclosure would involve a breach of the company's legal obligations, either under contract or legislation." Statement by the U.S. Industry Coordinating Group concerning the Vredeling Proposal 5 (Mar. 1983). On the other hand, the definition is broad because disclosure of the very types of decisions covered by the Vredeling

ber states must establish tribunals to settle disputes over confidentiality.<sup>105</sup>

Finally, the proposed directive encourages the creation of multinational employee bodies.<sup>106</sup> If a body exists representing employees at a level higher than that of the subsidiary, the directive provides that the information to be disseminated under the directive must be given to that body, and where authorized by the employee representative, consultations are to be held at that level.<sup>107</sup> Agreements establishing the formation of bodies representing all employees in a multinational enterprise are also authorized.<sup>108</sup>

As is readily apparent, this proposal goes beyond the provisions of the ILO Tripartite Declaration and OECD Guidelines. These latter instruments merely provide for reasonable notice of changes in operations in order to mitigate their adverse *effects*. In contrast, the Vredeling Proposal requires management to consult with employees concerning the *measures themselves*, not merely their effects. This obligation has aroused particular resistance from employer organizations.<sup>109</sup> They argue that notification of such changes might simply give unions advance notice within which to organize their opposition to the change. This argument convinced the United States Supreme Court to hold that bargaining over a decision to close a facility was not mandatory under the National Labor Relations Act in *First National Maintenance Corp. v. NLRB*.<sup>110</sup>

In *First National Maintenance Corp.*, the Supreme Court noted that mandatory bargaining is premised upon the belief that collective discussions "will result in decisions that are better for both management and labor and for society as a whole," but that this would only be true if the subject proposed for discussion is amenable to resolution through the bargaining process.<sup>111</sup> This will not be

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Proposal, such as closures and mergers, could "lead to [their] failure" (and thus qualify as confidential information) because disclosure could provoke trade union activity designed to block the decision.

105. *Id.* art. 7(3).

106. Although the proposal does not describe how such multinational employee bodies are to be established, if such a body is established, the member states are authorized to limit the subsidiaries' obligations under the proposed directive and to allow those obligations to be satisfied at the higher level. Vredeling Proposal, *supra* note 10, art. 5(4).

107. *Id.* art. 5(1), (2).

108. *Id.* art. 5(3).

109. Statement by U.S. Industry Coordinating Group on the Vredeling Proposal 2 (Mar. 1983).

110. 452 U.S. 666 (1981).

111. *Id.* at 678.

the case where a decision is made to close a particular facility, because the union's principal purpose in participating in consultations will be largely to delay or halt the decision, not to assist in making a better one.<sup>112</sup> Accordingly, the Court concluded that it is not appropriate to *require* the employer to bargain over the actual decision to close a facility, although it might be appropriate to require the employer to consult employees with respect to the decision's effects.<sup>113</sup>

Significantly, the employee concerns which gave rise to the Vredeling Proposal—concerns over the closure of plants and the acquisition of companies—involve precisely those decisions which may not be amenable to the collective bargaining process, as explained by the United States Supreme Court in *First National Maintenance Corp.* A requirement that management consult employees with respect to such decisions could lead to more rather than fewer confrontations between management and labor, depending upon the structure of labor relations in the particular European country involved.<sup>114</sup>

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112. *Id.* at 681.

113. *Id.* at 681-82.

114. For instance, in England, the trade unions have a greater tradition of confrontation; the present conservative government has been attempting to shift the balance of power away from the trade unions. See *Not for Spiking: Britain's Trade Unions Have to Be Kept Subject to the Rule of Law, Chiefly for Decent Trade Unionists' Sake*, *ECONOMIST*, Dec. 3-9, 1983, at 12. The Vredeling Proposal would upset these plans by shifting more power back to the trade unions by entitling them to consult with management over decisions not currently subject to collective bargaining.

By contrast, in the Federal Republic of Germany, the Works Constitution Act provides for the dissemination of certain information to, and consultation with, employees concerning decisions regarding matters at the shop-floor level, such as working hours, overtime, working surroundings and dismissals. Thus, the Vredeling Proposal would not appear to be wholly inconsistent with the current state of labor relations in Germany. Because the Vredeling Proposal differs from the German Works Constitution Act in certain aspects, however, the proposal might disrupt the current balance between trade unions and management. For instance, the Works Constitution Act embraces the notion that employee bodies should be independent from trade unions. See Opinion of Federation of German Employers' Association on the EEC Commission Proposal for a Directive on the Information and Consultation of Employees in Companies with a Complex Structure, Particularly Transnational 5 (Jan. 27, 1981); Kolvenbach, *Industrial Democracy: Legal Developments in Europe 1977-1979*, 1 N.Y.L. SCH. J. INT'L & COMP. L. 77, 84 (1980). In contrast, the Vredeling Proposal provides for consultations with employee representatives who will often be trade union officials. Vredeling Proposal, *supra* note 10, art. 1(e). Similarly, the German Works Constitution Act contains an absolute obligation to maintain industrial peace. In contrast, the Vredeling Proposal, by providing that consultations are to be held with a "view to attempting to reach agreement," envisions the possibility that agreements may be reached, if necessary, through industrial confrontation. Opinion of Federation of German Employers' Association, *supra* note 114, at 5. Finally, although the Works Constitution Act does pro-

*B. The Proposed Ninth Directive on Company Law*

The proposed Ninth Directive on Company Law is expected to be formally presented by the European Commission in the near future.<sup>115</sup> It will then be submitted for comment to the European Parliament and the Economic and Social Committee. As of the date of this Article, the official version has not been released, but the radical nature of its drafts has already elicited protests from organizations representing businesses and multinational enterprises.<sup>116</sup>

A draft of the European Commission's proposed Ninth Directive indicates that it would challenge the legal practice of limiting a company's liability to its equity value. Even further, it would subject the board members of a *parent* company—even one outside of the EEC—to joint and several unlimited personal liability or other sanctions if they make a decision harmful to the interests of a subsidiary within the EEC.<sup>117</sup> Specifically, the draft encourages parent companies to acquire by contract, namely a control contract, the right to manage their subsidiaries in the interests of the group.<sup>118</sup>

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vide for consultations with general works councils, which deal with questions concerning the whole company, its primary emphasis is on matters at the shop-floor level. *Id.* The Vredeling Proposal, on the other hand, places the locus of consultations on the highest level employee body. Vredeling Proposal, *supra* note 10, art. 5.

115. See *supra* notes 18-19. Because of the priority which the Commission has placed on the adoption of the Vredeling Proposal and Fifth Directive, official promulgation of the Ninth Directive may be delayed.

116. Both the National Foreign Trade Council, a private, non-profit organization of more than 650 United States companies engaged in foreign trade and investment, and the Council of American Chambers of Commerce (European and Mediterranean) have submitted papers in opposition to the draft Ninth Directive. See Memorandum Concerning the Proposed Ninth E.C. Directive on Company Law by the National Foreign Trade Council (Nov. 20, 1981); Memorandum on the Proposed Ninth Directive on Company Law of the Council of American Chambers of Commerce—European and Mediterranean (July 1981). These organizations object to the draft Directive's extension of joint and several unlimited liability to the members of a parent company's management board where the parent company's management undertakes actions attributable to mismanagement which damage a subsidiary. Art. 6(3)(a). Additionally, industry bristles at the requirement that the management body of each subsidiary prepare a special report describing significant measures which the subsidiary has taken or failed to take on the initiative of the parent company, identifying those measures which have been detrimental to the subsidiary, art. 7(2), (3), and thus inviting litigation. They view the likelihood of litigation to be particularly great since any benefits from those measures may not to be included in the report. Art. 7(3)(c). On the other hand, to avoid these obligations, the parent company must enter into a control contract, implementation of which requires that the minority shareholders of the subsidiary be offered the option of selling their shares. Art. 14

117. Ninth Company Law Directive, *supra* note 18, arts. 6(3) & 10.

118. Failure to enter into a "control" contract subjects the board members of the parent company to joint and several unlimited liability for mismanagement *vis-à-vis* the subsidiary

The contract entitles the parent company to manage the subsidiary; however, the parent must exercise its powers with the "care of a conscientious director and in the group interest."<sup>119</sup> The parent will be held liable for the obligations of the subsidiary arising during the contractual period unless the subsidiary's failure to satisfy its obligations is not the result of the parent's influence.<sup>120</sup> When such a "control contract" is implemented, minority shareholders of the subsidiary must be offered the choice of selling their shares.<sup>121</sup>

If the parent company does not enter into such a contract, the draft deems any parent which directly or indirectly exercises a "decisive" influence over the decision-making of a subsidiary a *de facto* member of the subsidiary's management, and holds the parent liable to the subsidiary for any damage resulting from the parent's "interference and attributable to mismanagement."<sup>122</sup> Arguably, a decision by the parent company to eliminate or transfer a subsidiary's operations, although economically sound for the enterprise as a whole, could be considered such "interference" from the point of view of the subsidiary's employees.<sup>123</sup> In a controversial provision, the draft holds the directors of the parent company jointly and severally liable for such conduct.<sup>124</sup>

Finally, the draft requires that each subsidiary in the EEC provide a special report, stating all agreements with the parent or its subsidiaries, as well as significant measures which the subsidiary has taken or failed to take on the initiative of the parent, which are detrimental to the subsidiary.<sup>125</sup> Such reports themselves could generate litigation since they must be published.<sup>126</sup> Moreover, any shareholder, creditor or employee representative can apply to a court to appoint a special auditor where the special report refers to detrimental measures or where such detriment is otherwise al-

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and necessitates the annual preparation of a special report which identifies actions and omissions by the parent company which are harmful to the subsidiary. Art. 7. See *supra* note 116; Schneebaum, *The Company Law Harmonization Program of the European Community*, 14 LAW & POL'Y IN INT'L BUS. 293, 317 (1982).

119. The Ninth Directive, *supra* note 18, art. 25.

120. *Id.* art. 29(2).

121. *Id.* arts. 14 & 15.

122. *Id.* art. 6.

123. See Memorandum Concerning the Proposed Ninth E.C. Directive on Company Law, *supra* note 116, at 3.

124. The Ninth Directive, *supra* note 18, art. 6; see *supra* note 116.

125. *Id.* art. 7; see *supra* note 116.

126. *Id.* art. 8(2)

leged.<sup>127</sup> If the court determines that the parent company interfered in the management of the subsidiary, causing it damage, it may order suspension from office of one or more members of the management or supervisory body, revoke the damaging measures, or order the parent company to offer to purchase the shares held by the subsidiary's shareholders.<sup>128</sup>

It should be apparent that the proposal addresses the same issue addressed in the *Badger* case discussed in connection with the OECD Guidelines: the extent to which a parent is liable for the obligations which its subsidiary is unable to perform. The proposal, however, goes well beyond the *Badger* case, which considered the parent company's obligation to be only morally based and limited to the circumstances.<sup>129</sup>

Because industry groups<sup>130</sup> view the Ninth Directive as one of the most radical proposals by the European Commission, these groups have expressed great concern over, and opposition to, the draft measure.<sup>131</sup>

### C. The Proposed Fifth Directive

The EEC's proposed Fifth Directive concerns employee participation in management.<sup>132</sup> Although it is not aimed specifically at multinational enterprises, it would have a significant impact on any multinational enterprise with subsidiaries in the EEC.<sup>133</sup> Because it has met great opposition,<sup>134</sup> little progress had been made toward its enactment until recently.<sup>135</sup> On July 28, 1983, however, the Com-

127. *Id.* art. 9.

128. *Id.* art. 10.

129. See *supra* note 39.

130. E.g., the National Foreign Trade Council, the Council of American Chamber of Commerce—Europe and Mediterranean. See *supra* note 116.

131. See National Foreign Trade Council's Memorandum Concerning Proposed Ninth EC Directive on Company Law, *supra* note 116; Council of American Chambers of Commerce—Europe and Mediterranean, *supra* note 116.

132. Amended proposal for a Fifth Directive, *supra* note 16.

133. Any company employing, on average, a number of persons which equals or exceeds the level fixed by each member state (which cannot exceed 1,000) must provide for employee participation pursuant to the directive. *Id.* arts. 4 & 21(b). Since employees of subsidiaries in the EEC can be counted as employees of the enterprise for purposes of satisfying the required minimum, *id.* arts. 4(1) & 21(b), multinational companies with subsidiaries in the EEC would be subject to the proposed directive.

134. Opposition has been particularly great in the United Kingdom, Ireland and Denmark. Ottavanger & Pais, *Employee Participation in Corporate Decision Making: The Dutch Model*, 15 THE INT'L LAW. 393, 407 (1981).

135. The proposal for the Fifth Directive was first presented by the European Commis-

mission approved a revised draft and has submitted it to the Council of Ministers to be considered for adoption.<sup>136</sup>

The proposed Fifth Directive would require companies employing a minimum number of employees, which cannot be fixed by any member state at more than one thousand,<sup>137</sup> to provide for employee participation in management through one or more of the following alternatives:<sup>138</sup> (1) participation through employee representatives on a supervisory board<sup>139</sup> or as non-executive members of a management board;<sup>140</sup> (2) participation of employees on a supervisory board by co-optation (the Dutch model);<sup>141</sup> (3) partici-

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sion to the Council of Ministers on October 9, 1972. 15 O.J. EUR. COMM. (No. C 131) 49 (Dec. 13, 1972).

136. Amended Proposal for a Fifth Directive, *supra* note 16, at 2.

137. See *supra* note 133.

138. Since the proposal is in the form of a directive, each member state would be free to implement it within the minimum standards provided therein. See *supra* note 81.

139. Amended Proposal for a Fifth Directive, *supra* note 16, art. 4(b). This option is applicable to companies with a two-tier system, i.e., companies which have a management board and a supervisory board. For such companies, the management board is responsible for managing the business of the company, whereas the supervisory board is responsible for controlling the management body. See Preamble to Amended Proposal for a Fifth Directive, *supra* note 16. Specifically, the members of the management board may be dismissed by the supervisory board, *id.* art. 13, and the supervisory board's authorization must be obtained for major decisions, such as those relating to the closure or transfer of the enterprise, the substantial curtailment or extension of the activities of the enterprise, substantial organizational changes and the establishment of long-term cooperation with other enterprises or the termination thereof. *Id.* art. 12(1). Currently, only the Federal Republic of Germany and the Netherlands have a two-tier system comprised of a management board and supervisory board. Ottervanger & Pais, *supra* note 134, at 407.

140. Amended Proposal for a Fifth Directive, *supra* note 16, art. 21(a), (b). The Fifth Directive presupposes that where a company only has a management body (as opposed to an additional supervisory board), a *de facto* distinction within that body exists between executive members who manage the business of the company and non-executive members who confine themselves to supervision. See Preamble to Amended Proposal for a Fifth Directive, *supra* note 16. Where a state permits a company to have a one-tier system, the proposed Fifth Directive provides that the executive members of the management board will be appointed by the non-executive members. *Id.* art. 21(a). The directive would then provide for employee participation in the appointment of the non-executive members. *Id.* art. 21(b), (d).

141. Amended proposal for a Fifth Directive, *supra* note 16, art. 4(c). The concept of co-optation is derived from the Dutch Civil Code in connection with the supervisory boards for larger companies. See Ottervanger & Pais, *supra* note 134, at 403. Under the co-optation concept, the supervisory board actually selects its own members, although the shareholders and work council are entitled to make recommendations concerning selection. *Id.* at 404. Under Dutch law, however, the shareholders and work councils can veto an appointment of a person believed to be unsuitable, or whose appointment would cause the supervisory board to be improperly constituted. In such an instance, the supervisory board, if it still wishes to appoint that person, must seek a finding from an independent body that the objections are not justified. *Id.* Accordingly, like its Dutch model, article 4(c) of the Fifth Directive provides that with respect to the co-optation alternative, "members of the supervisory

pation through the establishment of an employees' representative body with rights of consultation and to information;<sup>142</sup> or (4) employee participation pursuant to the terms of a collective bargaining agreement, subject to prescribed minimum standards of participation.<sup>143</sup>

These alternatives are intended to assuage the critics of the previous draft of the Fifth Directive which would have required that companies establish a two-level board system for employee participation. Currently, only the Federal Republic of Germany and the Netherlands have a two-tiered system, comprised of a supervisory board with employee membership, which appoints and oversees a management board responsible for managing the business of the company.<sup>144</sup> Under the revised proposal, the other option of a single management body is allowed. Whether there is a supervisory board or a single management body, however, employees would have at least one-third and a maximum of one-half of the seats of the supervisory board or of the non-executive membership on the

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organ shall be appointed by co-optation by that organ," and it permits the shareholders or employee representatives to object to the appointment of a proposed candidate on the ground either that he lacks the ability to carry out his duties or that, if he were appointed, the supervisory organ would be improperly constituted with regard to the interests of the company, the shareholders and the employees.

142. Amended Proposal for a Fifth Directive, *supra* note 16, arts. 4(2), 4(d), (e). Under this option, an employee body has the right to regular information and consultation on the "administration, situation, progress and prospects of the company, its competitive position, credit situation and investment plans." *Id.* art. 4(d). The employee body must also be consulted before the supervisory board authorizes decisions relating to the closure or transfer of the enterprise or of substantial parts thereof, the substantial curtailment or extension of the activities of the enterprise, or substantial organizational changes in the enterprise. This alternative is available for companies with either the two-tier system, *id.* art. 4(2), or a one-tier system. *Id.* art. 21(b)(2).

143. *Id.* arts. 4(2), 4(e) & 21(f). This alternative is available for companies with either a two-tier, *id.* 4(2), or a one-tier system. *Id.* art. 21(b)(2). For companies with a two-tier system, the members of the supervisory board would be appointed (i) by employee vote (up to a maximum of one-half of the board) or (ii) by co-optation. *Id.* art. 4(f). In the alternative, the collective bargaining agreements would have to provide for the right of employee representatives to regular information and consultation with the company's management board on "the administration, situation, progress and prospects of the company, its competitive position, credit situation, and investment plans." *Id.* art. 4(g). In addition, the collective bargaining agreement would have to provide for employee consultation before the supervisory board authorizes decisions relating to, *inter alia*, the closure or transfer of the enterprise, the substantial curtailment or extension of the activities of the enterprise, or substantial organizational changes within the enterprise. *Id.* arts. 4(g) & 12. Similar requirements would apply to one-tier companies. *Id.* art. 21(g), (h).

144. See *supra* note 139; Schneebaum, *supra* note 118, at 308-09.

single management board.<sup>145</sup>

As might be expected, this proposal has been vigorously opposed by business organizations.<sup>146</sup>

## V. CONCLUSION

Since World War II, the increasing desire of sovereign nations to control their economies in an active manner inevitably has directed attention to multinational enterprises, a business form perceived as one which was least subject to any individual sovereign's control. The OECD Declaration and ILO Tripartite Declaration were the results of a multinational effort to set guidelines for their behavior. Their flexibility insured their support; the multinational nature of the effort guaranteed that they would not discourage investment in any particular location.

However, some of the proposed legislation in the EEC suffers from two defects. First, because the EEC has a smaller membership than the OECD, it cannot guarantee that its legislation will not simply encourage investment outside, rather than inside, the EEC. Second, by proposing measures which increase corporate obligations and liabilities, the proposed legislation increases the costs of doing business in the EEC.

Nonetheless, measures which increase employee consultation or enhance employee protection can be salutary to the efficiency of the enterprise's operations and attitude of the employees. However, some of the proposed legislation also protects employees by granting them increased rights with which to resist change (rather than simply mitigate its consequences). Since economies are in constant flux, protection against change impedes the flexibility necessary to adjust to it. Indeed, the consequence of absolute protection is the maintenance of the status quo, and those who maintain the status quo will ultimately be outcompeted by those who do not. Hence, measures which approach absolute protection can cause the reduced growth and increased unemployment which the measures were intended to mitigate in the first place. While it may be concluded that the benefits of such legislation outweigh its risks, care must be taken that those same risks do not cancel, rather than simply balance, those benefits.

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145. Amended Proposal for a Fifth Directive, *supra* note 16, arts. 4(b) & 21(d).

146. See Schneebaum, *supra* note 118, at 308-09.